United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Affidavit

76-6151

To be argued by
FREDERICK P. SCHAFFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6151

B P/S

CHARLES R. HARARY,
Plaintiff-Appellant,

—v.—

WILLIAM E. SIMON, Secretary of the Treasury
of the United States of America,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE

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BRIEF OF DEFENDANT-APPELLEE

Issues Presented

1. Did the District Court correctly hold that the outcome of the criminal proceeding did not establish entrapment as a matter of collateral estoppel in the subsequent administrative disbarment proceeding?

2. Did the District Court correctly hold that appellee acted properly in commencing disbarment proceedings against appellant for his bribery of an IRS agent?

3. Did the District Court correctly hold that appellant's fraudulent misrepresentation to his clients of the amount of the bribe for the purpose of personal gain violates the provisions of 31 C.F.R. § 10.22(c) and that as applied to the facts of this case, 31 C.F.R. § 10.22(c) is not unconstitutionally vague?

Statement of the Case

This action was commenced on December 30, 1974. The complaint seeks judicial review of the decision of the Secretary of the Treasury to disbar appellant from practice as an accountant before the Internal Revenue Service (271a-75a).* An answer was filed on behalf of appellee on March 3, 1975 (276a-78a). After filing the administrative record of the disciplinary proceedings in the District Court (A300), the parties moved for summary judgment (279a-87a). On July 28, 1976 the District Court filed its opinion denying appellant's motion for summary judgment, granting appellee's motion for summary judgment, and ordering that the complaint be dismissed (288a-98a). Accordingly, on July 30, 1976, a judgment was entered dismissing the complaint (A377), and on September 23, 1976, appellant filed his notice of appeal. (A378).

Facts

A. Procedural Background

1. Prior Criminal Proceeding

On December 23, 1970, appellant was charged in a three-count indictment in 70 Cr. 1104 (S.D.N.Y.) with

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* Page references followed by the letter "a" refer to the Appendix of plaintiff-appellant. Page references preceded by the letter "A" refer to the Supplemental Appendix of defendant-appellee, whose pages are numbered consecutively following the last page of the Appendix. The Supplemental Appendix was made necessary by the failure of appellant to include in his Appendix all of the administrative record of the proceeding before the Department of the Treasury which was considered by the District Court on the motions for summary judgment and which is part of the record on this appeal. A motion for leave to file the Supplemental Appendix is being filed by defendant-appellee together with this Brief.

(1) conspiring to bribe a special agent of the Internal Revenue Service in violation of 18 U.S.C. § 371, (2) bribing said agent in violation of 18 U.S.C. § 201(b), and (3) paying said agent a gratuity in violation of 18 U.S.C. § 201(f) (6a-9a). Appellant was tried before the Honorable Charles M. Metzner and a jury, and on June 4, 1971 he was acquitted of the conspiracy and bribery charges and convicted of the gratuity charge.* On February 28, 1972, this Court reversed the conviction on the gratuity charge and ordered that count of the indictment dismissed on the ground that the District Court erred in submitting that lesser included offense to the jury because it was inconsistent with the evidence. *United States* v. *Harary*, 457 F.2d 471 (2d Cir. 1972) (216a-41a).

2. Administrative Disbarment Proceeding

On November 24, 1972, the Acting Director of Practice of the U.S. Department of the Treasury filed a complaint pursuant to 31 C.F.R. § 10.54 charging appellant with misconduct and seeking to disbar him from further practice as an accountant before the Internal Revenue Service (242a-45a). Paragraph II of the complaint alleges that appellant violated 31 C.F.R. § 10.51(f) by attempting to influence an Internal Revenue agent in his conduct of an audit of appellant's client by offering said agent a payment of $1,250.00. Paragraph III of the complaint alleges that appellant agreed with others to so influence said Internal Revenue agent. Paragraph IV of the complaint alleges that appellant violated 31 C.F.R. § 10.22(c) by overstating to his clients the amount

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* This was the second trial of appellant on said indictment, the first trial having ended in a mistrial because of the inability of the jury to reach a verdict.

of the payment that the Internal Revenue agent had agreed to accept for the purpose of personal gain in defraud of his clients.

On October 4, 1973, a hearing was held before an Administrative Law Judge. At the hearing the parties jointly offered the transcript of the testimony at the June 1971 criminal trial, and that transcript was received into evidence as representing the testimony of the trial witnesses if they had been called to testify in the administrative proceeding (A310-28). Also introduced as exhibits were copies of the administrative complaint (A305) and answer (A305-06), the criminal indictment (A351), and the decision of this Court in *United States* v. *Harary*, *supra* (A351-53). In addition, the Administrative Law Judge heard the testimony of Internal Revenue Agent William Windwear, who had not been a witness at the criminal trial (A328-49).

On February 20, 1974, the Administrative Law Judge issued his initial decision in which he found that appellant had violated the Treasury Department regulations as charged in the complaint and ordered appellant disbarred from further practice before the Internal Revenue Service (253a-61a). In that initial decision the Administrative Law Judge considered and rejected all of the grounds for reversal which were asserted by appellant below and are again being urged on appeal to this Court. On March 18, 1974 appellant appealed from the initial decision pursuant to 31 C.F.R. § 10.71. On June 17, 1974, the General Counsel of the Department of the Treasury issued his decision affirming the initial decision of the Administrative Law Judge in all respects (262a-71a).

B. Evidence of Appellant's Misconduct

The facts underlying the disbarment of appellant from practice before the Internal Revenue Service are con-

tained in the uncontested testimony of the Government's witnesses at the criminal trial* and were succinctly summarized in the opinion of the Court below (292a-94a) and the opinion of this Court in *United States* v. *Harary*, *supra*, 457 F.2d at 472-74 (217a-20a). They are as follows:

Pursuant to the request of Inspector Harold Wenig of the Internal Revenue Inspection Service, Revenue Agent Lawrence Ostrow was assigned in August 1970 to conduct an audit of the tax returns of Sutton and Sutton, Ltd. for the fiscal years ending August 31, 1967 and August 31, 1968 (38a-39a, 55a-56a).** Ostrow then arranged with Mike [Meyer] Sutton, of Sutton and Sutton, Ltd., and with appellant, the corporation's accountant, to meet with them on September 1, 1970 (37a). Thereafter Ostrow met with Wenig and was informed that Wenig had information from an informant that Mike Sutton and Al [Abraham] Sutton were possible "pay-off people" and that there might be a bribe offer on the audit (59a, 176a-77a). Wenig requested that any such overtures be reported back to him but that Ostrow should delay any action in receiving anything that the taxpayers offered him (163a).

On September 1, 1970, Ostrow met appellant at the offices of Sutton and Sutton, Ltd., and after a half-hour

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* The Government presented its case through the testimony of Revenue Agent Lawrence Ostrow and Inspector Harold Wenig. The defense case consisted solely of three character witnesses.

** In both the criminal proceeding and this action, appellant has stressed that the audit was initiated at the request of the Inspection Service in part because the Suttons were suspected of being "pay-off people." However, as the testimony of Inspector Wenig made clear, there is nothing unusual about a referral of a case by the Inspection Service to the Audit Division for that reason (179a, A372-73).

of general conversation the audit began (37a-38a). During this general conversation appellant told Ostrow that he knew someone in the camera business and that he might be able to get him a camera at a good price (75a).

During the course of the audit Ostrow went through the books and records of the corporation and various matters were discussed by Ostrow and appellant including a $199,000 entry on the corporation's balance sheet which was shown as a capital investment in the corporation (38a, 40-41a). Ostrow asked appellant if he could substantiate the source of the $199,000 capitalization item in order to determine whether this item came from a nontaxable source (41a, 65a).* Appellant replied that the money came from Israel and represented the liquidation of an estate (41a, 65a). Ostrow and appellant discussed this matter for approximately 15 to 25 minutes; Ostrow told appellant that he would need substantiation for the capitalization item such as cancelled checks, notarized statements or bank records, and appellant agreed to get the additional substantiation (65a-66a).

After working for the morning of September 1, Ostrow and appellant broke for lunch (41a, 70a). After lunch, on the way back to the offices of Sutton and Sutton, Ltd., appellant offered to provide Ostrow with the services

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* While this item could not affect the taxes paid by the corporation, it was relevant to the tax status of the individuals who paid the money to the corporation (88a). As testified to by Revenue Agent Windwear at the administrative hearing and by Revenue Agent Ostrow at the criminal trial, it is normal procedure for an auditor to pursue items on a corporation's returns which might cause additional taxes to be assessed against related individuals, and indeed additional deficiencies were assessed against Mike and Al Sutton relating to the capitalization item (31a, 38a; A358).

of a prostitute and said that he would pay for it, but Ostrow refused this offer (41a-42a).

Ostrow spent the afternoon examining the corporation's books, entertainment bills, and purchase records and making notes (42a, 69a-71a). Before concluding the audit for the day, Ostrow again asked appellant for substantiation of the $199,000 capitalization item as well as of other items and for copies of the Suttons' individual tax returns and the tax returns and inventory of 6 discount stores owned by them for the next audit meeting on September 22, 1970 (42a-43a, 71a). Appellant agreed to drop off copies of the personal tax returns of the corporate officers on the following Friday, September 4 (72a).

As Ostrow was about to leave, appellant insisted that Ostrow have a drink with him (43a). In the bar, appellant offered Ostrow a Yashica camera worth more than $200 which Ostrow refused saying that "it wouldn't be right" (43a). After Ostrow refused the gift a second time, appellant offered to sell the camera to Ostrow for $15 (43a-44a).

Ostrow saw Inspector Wenig on September 2, 1970, and told him of the offers of the prostitute and the camera (44a). In view of these overtures, Wenig instructed Ostrow to cancel his Friday appointment with appellant in order to provide more time to prepare for the second meeting (76a-77a, 164a-65a). Prior to the recommencement of the audit on September 22, 1970, Ostrow went to Wenig's office on three further occasions. At the first meeting Ostrow was given copies of the individual tax returns of the Suttons which Ostrow had asked appellant for on September 1, 1970 (78a-79a). At the second meeting, Wenig told Ostrow that once a bribe offer was made he had a right to bargain, but that

Ostrow was not to broach or suggest a bribe; Ostrow was further told to treat the audit as a normal audit (80a-82a). Finally, on September 22, 1970, before recommencing the audit, Ostrow went to Wenig's office and was equipped with two recording devices (82a-83a).

The audit resumed on the morning of September 22 at the offices of Sutton and Sutton, Ltd. (44a, 83a-84a). Appellant produced the tax returns for the discount stores, the individual returns of Mike and Al Sutton, and the inventory sheets previously requested (46a, 84a-85a). In addition, appellant offered some letters to show substantiation of the $199,000 capitalization item (46a-47a).

Ostrow told appellant that the letters were insufficient substantiation and that since Harary had stated that the money had come over from Syria by check, Ostrow would need the cancelled checks in order to determine whether the capitalization money had come from a non-taxable source (47a). Appellant brought Mike Sutton into the room, and he corroborated Harary's account of the source of the $199,000 (48a). Ostrow reiterated that he would need the cancelled checks transmitting the proceeds of liquidation of the estate and possibly notarized statements from third parties establishing that they had sent the money from Syria (48a). Mike Sutton said getting such statements would be difficult (48a, 96a-97a).

Ostrow explained to Mike Sutton and appellant twice during the morning of September 22, 1970 that if proper substantiation of the $199,000 capitalization item was not produced and if he could not verify that the capitalization item came from money that had been previously taxed or from a source that was tax free, he would have to tax the individual shareholders of Sutton & Sutton, Ltd. (49a, 127a). In addition, Ostrow told them on at least two

occasions that if they did not agree with anything that he had done, including an adjustment with respect to the capitalization item, they had a right to go to conference or appellate procedure within the Internal Revenue Service and then to the Tax Court (49a, A360-61).

During the discussion of the capitalization item with Mike Sutton and appellant, Mike Sutton asked five or six more times what Ostrow would need to make the item good and each time Ostrow told him what was needed for substantiation (48a-49a, 99a). Mike Sutton kept saying "what type of items can I show" and "what can I do, what can I give you to make the item good" (99a). In response to Ostrow's repeated requests for substantiation, Mike Sutton suggested that Ostrow accept the capitalization item and say it was good even though no substantiation had been shown (117a, 121a). Similarly, appellant suggested that Ostrow forget about the capitalization item or even "lie about the it[illegible]." (A364-65).

After lunch appellant and Ostrow continued the audit alone (50a). As described in the trial testimony of Agent Ostrow, the following conversation thereafter occurred:

> After we returned from lunch, Mr. Harary and myself went into the office we were working in and there we had a short general discussion and then Mr. Harary mentioned what else did we have to do, what had we left to do and the topic came up about the various items and also the capitalization.
>
> After I had the inventory to look at and also the capitalization and at that point Mr. Harary said that he thought that had resolved the item and I explained to him that what was needed was the various items of substantiation and Mr. Harary at that time mentioned that the items was good

and he mentioned compensation and at that point I said to Mr. Harary, "What do you want me to do," after he had mentioned this compensation.

He continued talking about why the item was good and these various things and we had a short discussion then again on what type of items would be required to make the item good, what items that would make this a good item.

Then again Mr. Harary mentioned "Maybe we can compensate you with some women or some money," and again I said, "What do you want me to do," and this time Mr. Harary stated that he wanted me to accept the items, not to go into it any further and say that it was good and after he had said this, I stated to Mr. Harary, "All right; is this what you want me to do; go on keep talking as to anything else you want me to do."

And then he said, "Well, maybe a small disallowance to make it look good," and he questioned possibly no change and then he mentioned that he would give me $250 and with my previous discussion with Inspection they stated to me that once an offer is made, I can bargin with the taxpayer but—and increase his offer and since an offer was made to me, I went ahead and just said to Mr. Harary, "You are making the offer, continue talking," and at that point he mentioned $500 and asked me what did I want and I never gave Mr. Harary a definite answer but in order to increase his offer, because what he was asking, the $250 for what he was asking, the type of adjustment and the type of taxes that should be forgotten, $250 was very small and I would either reply, "You know what we are talking about; we are talking about $60,000 in taxes. You are

> making the offer, continue talking," and subsequently Mr. Harary offered me $750 and then he went up to $1000 and then he went up to $1250 and at that point I had accepted his offer and—— (50a-51a).

After Ostrow's acceptance of his offer, appellant went out of the room and on his return told Ostrow that Al Sutton was going to get the money (51a-52). While waiting for Al Sutton to return, Ostrow asked appellant what he wanted him to do and Harary decided on a no change report [a report to one's superiors that no irregularities were discovered upon audit and that no additional taxes are due] (52a). Later, appellant brought Mike Sutton into the room and Sutton and Ostrow discussed the camera which had previously been offered to him (52a-53a). Appellant, who had been in and out of the room, then came in and said Al was back, and appellant and Mike Sutton left the room. Shortly thereafter appellant returned and gave Ostrow $1250 in a brown paper bag (53a).

On September 29, 1970, appellant was arrested and was brought to the office of Assistant United States Attorney Andrew J. Maloney and was advised of his constitutional rights (168a-71a). Appellant requested the presence of his attorney Irwin Klein who came to Maloney's office and conferred with appellant (171a-72a). In the presence of Assistant United States Attorneys Sale and Maloney, Inspector Wenig, and his attorney Mr. Klein, appellant was again informed of his constitutional rights, and he indicated that he understood (172a). As Inspector Wenig testified, the following conversation then took place.

> He [Mr. Maloney] first asked Mr. Harary did he pay a $1,250.00 bribe to Revenue Agent Lawrence Ostrow and Mr. Harary said "Yes" and then Mr. Harary was asked who was instrumental

in pushing this bribe and Mr. Harary stated that the Sutton Brothers were behind it and they had asked Mr. Harary, that is, the Sutton Brothers asked Mr. Harary to close the deal and then he asked why was the bribe paid and Mr. Harary stated that he was giving the Sutton Brothers a blow-by-blow description of what the Revenue Agent was doing during the examination and when the Revenue Agent told Mr. Harary that there could be a possible tax assessment of $60,000.00, he had communicated this fact to the Suttons and Mr. Harary said, since people don't like trouble and if the agent looks long enough he is going to find something wrong, they had decided to pay him.

And Mr. Harary then stated that he and the Suttons felt that after the initial meeting with Revenue Agent Ostrow on September first that the agent was aproachable and that was the reason that they had tried this attempt.

Then Mr. Harary was asked who was the one that made the initial overture of the bribe; who was the one that first offered the bribe, and Mr. Harary stated that he was the one that offered the bribe first and not the agent. The agent didn't make any pitch for a bribe; that he was the one.

Then he was asked how much money did he ask the Suttons for to pay off the Revenue Agent and Harary stated that when he had spoken to the Suttons, he had told them that the Revenue Agent had agreed to accept $2,000.00 and when Mr. Sutton, Abe Sutton, had come back from the place where he had obtained this $2,000.00, he had given this money to Mr. Harary and Mr. Harary

was asked if he kept any of that money for himself and he said "Yes," that he took $750.00 out of that $2,000.00 and kept it for himself, without telling the Suttons what he was doing and without telling the Revenue Agent. (173a-74a).

Appellant also stated that it was purely his idea to offer Ostrow the services of a prostitute (174a).

ARGUMENT

POINT I

The District Court Correctly Held That The Outcome of the Criminal Proceeding Did Not Establish Entrapment As A Matter Of Collateral Estoppel In The Subsequent Administrative Disbarment Proceeding.

Appellant's principal argument in this case is that the prior criminal proceeding determined the issue of entrapment in his favor and that the doctrine of collateral estoppel precludes appellee's redetermination of this issue. There are two flaws in this argument.

A. The Criminal Proceeding Did Not Establish That Appellant Was Entrapped

First, neither the jury verdict nor this Court's decision in the prior criminal proceeding constitutes a

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* Appellant discusses at length the first criminal trial to establish that the only defense offered was that of entrapment. Appellee does not dispute this. However, appellant never offered the transcript of that trial into evidence at the administrative hearing, nor requested that judicial notice be taken of it. Thus,

[Footnote continued on following page]

determination that appellant was entrapped. Appellant argues at great length that the only disputed issue in the criminal case was the entrapment defense* and that under the principles established in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the general verdict of acquittal on the bribery and conspiracy counts must be viewed as a determination of entrapment. The obvious difficulty with this argument, however, is that the jury returned a verdict of conviction on the gratuity count. Entrapment, had it been found by the jury, would have been a complete defense to all counts of the indictment, and the judge so charged the jury (212a). This Court specifically noted this anomoly in its opinion:

> But, the government argues that the jury might have decided Harary did intend to influence Ostrow in his conduct of the audit, and that he was entrapped. The jury could thus find him not guilty of bribery. The difficulty with this explanation of the jury's verdict on the bribery count is that it does not afford any rational basis for the gratuity conviction. *In fact, we can see no justification whatsoever for concluding on the facts presented to us that Harary could have been entrapped into giving a bribe, but not into giving a gratuity. If he was ready and willing to commit one offense, it is only logical in the circumstances before us that he would have been ready and willing to commit the other.* (Emphasis added.)

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it was never considered by appellee, and it is not part of the administrative record of the disbarment proceeding. Moreover, the transcript of the first criminal trial was not submitted to the District Court in connection with the motions for summary judgment and is not part of the record on appeal. Appellant's inclusion of excerpts from it in his Appendix and his references thereto in his Brief are therefore improper.

United States v. *Harary*, *supra*, 457 F.2d at 477-78 (227a). This Court went on to discuss the contradictory verdict returned by the jury with the evident explanation that it was the result of "a compromise" based on the jury's "difficulty in agreeing on a verdict." *Id.* at 479 (230a).

In view of the obviously contradictory and compromised nature of the verdict, it simply cannot be concluded that the entrapment issue was decided in the criminal case.* As the Supreme Court said in *Ashe* v. *Swenson*, *supra*, 397 U.S. at 444, the inquiry into the meaning of a general verdict in a criminal case " 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' " Where, as here, the verdict was simply not the work of a "rational jury", it cannot be collateral estoppel on the issue of entrapment.

Appellant attempts to deny the significance of the jury's conviction on the gratuity count by relying on the reversal of that conviction by this Court (Brief, p. 32). Appellant argues, somewhat disingenuously, that this Court corrected the illogical verdict on the gratuity count while keeping intact the allegedly "rational" acquittal on the bribery and conspiracy counts. However, as noted above, the opinion made clear that the verdict was illogical not only because the conviction on the gratuity count had no valid basis in the evidence, but also because the entrapment defense should have been applied either to all or to none of the counts in the indictment. As this Court

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* In response to a similar contention made in *United States* v. *Cohen*, 431 F.2d 831, 833 (2d Cir. 1970) this Court noted that "the jury may have acquitted on the bribery count because it felt that its verdict of guilty on the lesser charge of a gratuity would insure sufficient punishment."

recognized, the Fifth Amendment of the Constitution prevented it from disturbing the acquittal on the bribery and conspiracy counts. 457 F.2d at 479-80 (231a). But that portion of the verdict was no more rational than the conviction on the gratuity count. Thus, as the Court below correctly found, taken as a whole, the verdict cannot be interpreted as anything but an illogical compromise based on the jury's inability to reach a determination of the entrapment issue (295a-96a).

Appellant also contends that since the illogical verdict in the criminal trial was caused by the Government's error in insisting that the gratuity count be submitted to the jury, appellee herein should not be permitted to use that inconsistency as evidence that the verdict does not constitute a finding of entrapment (Brief, pp. 32-33). The doctrine of collateral estoppel, however, applies only to issues which "were actually adjudicated in the prior trial." *Lipsky* v. *Commonwealth United Corp.*, Docket No. 76-7125, slip op. at 711 (2d Cir., Dec. 1, 1976). If the gratuity count had not been submitted to the jury, the verdict on the bribery and conspiracy counts would undoubtedly have constituted a finding as to entrapment, although under those circumstances it is impossible to say what the verdict would have been. As it is, however, the entrapment was not "actually" adjudicated in the prior criminal proceeding, and no casting of blame by appellant can change that result. Thus, even if this case involved a subsequent criminal prosecution, the verdict in the prior proceeding would not be collateral estoppel on the issue of entrapment.

B. An Acquittal In A Criminal Prosecution Has No Collateral Estoppel Effect Upon A Subsequent Disbarment Proceeding.

Second, it is a well-settled principle of law that because of the different standards of proof applicable to criminal and civil proceedings, an acquittal in a criminal case does not preclude as a matter of collateral estoppel the relitigation of the same issues in a subsequent civil action. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235 (1972); *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 492-94 (1950); *Helvering* v. *Mitchell*, 303 U.S. 391, 397-98 (1938); *Stone* v. *United States*, 167 U.S. 178, 188 (1897); *Neaderland* v. *Commissioner of Internal Revenue*, 424 F.2d 639, 641-42 (2d Cir.), *cert. denied*, 400 U.S. 827 (1970).

As the Court below held, this principal is clearly applicable where the subsequent civil proceeding is one for disbarment (296a). In *In re Echeles*, 430 F.2d 347, 352 (7th Cir. 1970), the Court so held, stating that "it is the general rule that the acquittal of an attorney in a prosecution for criminal acts constitutes no bar to suspension or disbarment proceedings based on the same acts and attendant circumstances for conduct involved therein." See also *In re Doe*, 95 F.2d 386 (2d Cir. 1938), where, as here, the offense involved was that of bribery. See generally 7 Am. Jur. 2d, Attorneys at Law § 57; Drinker, Legal Ethics (1953) at 37.

Similarly, the courts have held that the acquittal of an Internal Revenue agent on charges of bribery does not preclude a determination that there is substantial evidence to support an administrative decision to remove him based on a preponderance of the evidence. *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223, 1231 (D.C.

Cir.), *cert. denied*, 414 U.S. 1001 (1973); *Finfer* v. *Caplin*, 344 F.2d 38, 41 (2d Cir.), *cert. denied*, 382 U.S. 883 (1965). As this Court reasoned in *Finfer*:

> The law does not require that the proof which might lead to an administrative determination that removal would be for the best interests of the IRS be of the same quality as would be necessary to convince a jury beyond a reasonable doubt to convict in a criminal case. The jury, to be sure, had not been convinced beyond a reasonable doubt but the Commissioner could well have concluded that the evidence was substantial enough to justify a refusal to reinstate.

Obviously the same legal principle must apply to the disbarment of an accountant who bribed an IRS agent as applies to the removal of an agent who accepted and failed to report the bribe.

Appellant seeks to avoid the application of this principle to the instant case by characterizing the administrative disbarment proceeding as "punitive" rather than "remedial." This distinction derives from the landmark decision in *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 397-98 where the Court held:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U.S. 178, 188; *Murphy* v. *United States*, 272 U.S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U.S. 476, 481, 482. Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is pre-

> cluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy* v. *United States*, 272 U.S. 630, 632.

Helvering (and the earlier decisions in *Stone and Murphy* cited therein) sharply limited the decision in *Coffey* v. *United States*, 116 U.S. 436, 443-45 (1886) where the Court had held in the conext of an *in rem* forfeiture action under the revenue laws that an acquittal in the prior criminal prosecution precluded the subsequent civil suit brought by the Government arising out of the same facts. Appellant fails to cite a single post-*Coffey* case in which a verdict of acquittal was held to be collateral estoppel in a subsequent civil action. Furthermore, a number of Supreme Court decisions subsequent to *Helvering* dealing with the application of the remedial-punitive distinction to civil forfeiture proceedings have effectively overruled the *Coffey* holding. *One Lot Emerald Cut Stones* v. *United States*, *supra*; *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151-54 (1956); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549-50 (1943).*

With respect to disbarment proceedings, the law is quite clear that for the purpose of determining the collateral estoppel effect of an acquittal in a prior criminal prosecution, disbarment is a remedial action. Indeed, in *Helvering* itself the Court stated that one type of remedial sanction "which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted" and specifically mentioned disbarment as a sanction of this type. 303 U.S. at 399 and n.2. See also *Ex parte Wall*, 107 U.S. 265, 287-88 (1882). More recently, the Seventh Circuit in *In re Echeles*, *supra*, 430 F.2d at 349, in concluding that an acquittal in a criminal

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* Nevertheless, for some unexplained reason appellant refers to *Coffey* as "the leading case" in this area (Brief, p. 34).

action did not preclude a subsequent disbarment proceeding, made the following observation:

> Preliminarily, it would be well to note that disbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, and result from the inherent power of courts over their officers. Such proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. . . . Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust. (Citations omitted.)

This characterization of the purpose of disbarment proceedings as being for the protection of the courts and the public rather than the punishment of attorneys accords with the view of other courts and commentators. See *Thread* v. *United States*, 354 U.S. 278, 281 (1957); *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958); *In re Spicer*, 126 F.2d 288, 289 (6th Cir. 1942); 7 CJS, Attorneys and Clients § 28; 7 Am. Jur. 2d, Attorneys at Law § 60; Drinker, *supra* at 35-36.*

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* *Cf. Paine* v. *Board of Regents of University of Texas System*, 355 F. Supp. 199, 203 (W. D. Tex. 1972), where the Court held that the suspension from the university of narcotics offenders is remedial, because it is intended to protect the university community and the educational goals of the institution from such adverse influence as those offenders might wield if allowed to remain as students.

In opposition to the overwhelming weight of this authority, appellant relies on language in several cases to the effect that disbarment imposes a punishment or penalty upon the practitioner and is therefore comparable to a criminal proceeding. None of these cases are apposite to the issue before this Court.

In the first place, much of the language upon which appellant relies is clearly dicta. The holding of the Court in *In re Ruffalo*, 390 U.S. 544, 550-51 (1968) is that a lawyer in a disbarment proceeding is entitled to procedural due process, including fair notice of the charge. In reaching this conclusion the Court quoted with approval the dissenting judge below that "'[s]uch procedural violation of due process would never pass muster in any normal civil or criminal litigation'." *Id.* at 551. Thus, its characterizations of disbarment as "a punishment or penalty imposed on the lawyer" and disbarment proceedings as "of a quasi-criminal nature" are obviously unnecessary to the holding of the case. See also *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972)* and *In re Fleck*, 419 F.2d 1040, 1045 (6th Cir. 1969).

Moreover, even if disbarment may properly be characterized as a penalty, the presence of a punitive aspect does not necessarily deprive an action of its remedial civil nature. *United States ex rel. Marcus* v. *Hess, supra*, 317 U.S. at 550-52. Nor does it follow from the fact that disbarment proceedings may be characterized as

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* It is especially noteworthy that although the Court in *In re Ming* applied the holding of *In re Ruffalo* to the facts before it, is nevertheless quoted with approval its language in *In re Echeles* that disbarment proceedings are not for the purpose of punishment but rather for the protection of the courts and the public and that an acquittal in a criminal action will not preclude a subsequent disbarment proceeding. 469 F.2d at 1353-54.

quasi-criminal in nature for the purpose of applying certain procedural rules that they are properly considered punitive for the purpose of applying the doctrine of collateral estoppel. As the Court stated in *Helvering* v. *Mitchell, supra*, 303 U.S. at 400, n. 3:

> The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced.

The reason for this is obvious. The verdict in a criminal proceeding could result in collateral estoppel in a subsequent "civil" proceeding which was "punitive" in nature only if the standard of proof in the latter was held to be proof beyond a reasonable doubt. There is no support whatsoever for the application of that standard to disbarment proceedings.

None of the cases cited by appellant in support of his contention that disbarment proceedings are punitive involve the issue of collateral estoppel; they therefore fail to advance his argument on this appeal As noted above, *In re Ruffalo*, *In re Ming*, and *In re Fleck*, all involved the application of the due process right to prior notice to disbarment proceedings. *Erdmann* v. *Stevens*, 458 F.2d 1205 (2d Cir. 1972) concerned the application of the abstention principle of *Younger* v. *Harris*, 401 U.S. 37 (1971) to state court disciplinary proceedings. And *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) dealt with the effect of a Presidential pardon on a subsequent disbarment.

For the same reason appellant's reliance on *Huntington* v. *Attrill*, 146 U.S. 657 (1892) is entirely misplaced. The issue in that case was whether the statute of one state was "penal" in the sense that another state was not required to give full faith and credit to a judgment under that statute. For the purpose of resolving that issue, the Court put forth the test of "whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Id.* at 667. That test has no relevance whatsoever to the remedial-punitive distinction established almost fifty years later in *Helvering* for the purpose of determining whether a civil action is barred by an acquittal in a prior criminal prosecution. Indeed, if that test were to be applied in this context, it would completely eviscerate the *Helvering* doctrine, since nearly all civil actions brought by the Government involve in some degree attempts to redress public wrongs.

In sum, the outcome of the prior criminal proceeding did not establish appellant's entrapment, and in any event, a determination of that issue in that proceeding would not preclude appellee's reconsideration of that defense in the administrative proceeding to disbar appellant. Thus, appellee is not collaterally estopped from disbarring appellant for the same conduct that was the subject of the prior criminal trial.

POINT II

The District Court Correctly Held That Appellee Acted Properly In Commencing A Disbarment Proceeding Against Appellant For His Bribery Of An IRS Agent.

Pursuant to 31 U.S.C. § 1026 and 31 C.F.R., Subpart C, §§ 10.50 *et seq.*, appellee has the authority to disbar accountants from practice before the Internal Revenue Service on account of certain conduct set forth in the statute and the regulations promulgated thereunder. Whatever the result of the criminal proceeding, but especially in view of its inconclusive outcome, appellee had the power and responsibility to determine whether appellant was fit to continue to practice before the Internal Revenue Service in light of the facts showing appellant's bribery of an IRS agent. There is nothing in appellee's exercise of that authority which supports appellant's claim of harassment and injustice. Despite his continued assertions to the contrary, it was *not* determined in the criminal proceeding that appellant was entrapped by the conduct of Agent Ostrow. Moreover, even if that interpretation could be imposed on the jury verdict, there was nothing improper in appellee's decision to redetermine that question for himself.

Appellant's sole support for his claim that the commencement of disciplinary proceedings against him was improper is the case of *Bender* v. *Board of Regents of the State of New York*, 30 N.Y.S. 2d 779 (App. Div. 1941).*

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* Appellant also makes reference to the alleged fact that neither the New York State Society of Certified Public Accountants nor the American Institute of Certified Public Accountants have taken disciplinary action against him. Although letters from

[Footnote continued on following page]

In that case a criminal prosecution had been brought against a dental technician by the name of Reeb charging him with the illegal practice of dentistry. Two witnesses testified that Reeb had performed dental services for them while Bender, a dentist, testified that he had performed the services which the prosecution witnesses alleged to have received from Reeb and that Reeb had done only such mechanical work in connection with the two cases as the law permitted. The jury returned a verdict of not guilty based upon their disbelief of the testimony of the prosecution witnesses and their acceptance of Bender's testimony. Thereafter, a disciplinary proceedings was instituted against Bender charging him with two counts of aiding and abetting Reeb in the illegal practice of dentistry and one count of unprofessional conduct in testifying falsely in the criminal action. After a hearing the dental board found Bender guilty on all counts and suspended him from the practice of dentistry, and that determination was sustained by the New York State Board of Regents. The Court reversed on the ground that there was clearly insufficient evidence in the administrative record to support the dental board's determination.* In view of this complete failure of

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these organizations were annexed to appellant's pre-hearing motion to dismiss the administrative complaint, no proof on this point was presented at the hearing or to the Court below. Thus, this matter is not part of the administrative record or of the record on appeal. In any event, appellee is obviously not bound by the decision of other organizations with disciplinary power over appellant to take no action with respect to his misconduct.

* At the hearing before the dental board, the only competent proof offered to establish Bender's guilt was the testimony of the same two witnesses who had been discredited by the jury at the criminal trial. In addition, the testimony of another investigator was offered and effectively rebutted, and 7 other witnesses testified as to dental work performed by Reeb as to which no participation by Bender was shown and for which Bender had not been charged in the administrative complaint.

proof, the Court commented in dicta that the disciplinary proceedings appeared to be an improper attempt to circumvent the criminal judgment for the purpose of persecution, rather than an honest effort to police the profession.

The instant case is clearly distinguishable from *Bender*, for apart from the discredited testimony of the two prosecution witnesses, there was simply no evidence of misconduct in the disciplinary proceeding under review in that case.* However, here there is no question that appellant in fact bribed an IRS agent. Nor is there any challenge to the sufficiency of the evidence in the administrative record to support appellee's finding that there had been no entrapment.** Indeed, the evidence of appellant's wrongful conduct is so overwhelming, and the evidence of entrapment so thin, that appellee would have been negligent in his duties if he had not disbarred appellee.

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* In relying on the jury verdict to discredit the testimony of those two witnesses, the Court in *Bender* violated its own recognition of the principle that an acquittal has no collateral estoppel effect on a subsequent civil action. This contradiction seriously undermine the validity of the Court's analysis. Even in this respect, however, the instant case is distinguishable from *Bender*. The jury in the criminal action against Reeb returned a definitive verdict based on a finding of credibility, an area in which a jury is generally thought to have special competence. In the criminal action against Harary, on the contrary, the jury's verdict was an illogical compromise based on an inability to reach a decision on the entrapment question and on an unwillingness to apply the law as the Court had instructed.

** At the administrative level, appellant did contend that the evidence was insufficient to support a finding of no entrapment. His abandonment of this argument on his motion for summary judgment in the District Court and on this appeal would seem to suggest that he concedes this issue.

The defense of entrapment involves two elements: (1) inducement of the crime on the part of the Government agent, and (2) lack of predisposition to commit the crime on the part of the accused. *United States* v. *Sherman*, 200 F.2d 880, 882 (2d Cir. 1952). See also *United States* v. *Licursi*, 525 F.2d 1164, 1168 (2d Cir. 1975). In this case appellant admitted that he made the initial overture and that the agent did not make any pitch for a bribe (173a). Furthermore, at lunch on the first day of the audit, September 1, 1970, appellant offered to provide Ostrow with the services of a prostitute (142a), which offer, appellant admitted, was entirely his own idea (174a). At the end of that day appellant offered Ostrow a camera (143a). Both of these overtures by appellant were an attempt to test Ostrow's reaction to see if he was approachable for an offer of a bribe (173a). Finally, the testimony of Ostrow clearly corroborates appellant's admission that it was appellant who initiated the bribe offer (50a-51a, A368). These facts clearly demonstrate that appellant was not induced into making the bribe by Ostrow and that he had a predisposition to commit that offense. Indeed, in its opinion on the criminal appeal, this Court felt constrained to note that

> . . . the evidence of guilt of bribery makes us reluctant to reverse the judgment of conviction on mere gratuity giving and we, too, find that this saga of attempted corruption of a federal official "revolting". . . .

United States v. *Harary*, *supra*, 457 F.2d at 80 (231a). The Court below thus correctly concluded that "the I.R.S., had ample grounds to seek disbarment of [appellant]" (296a), and it follows that the commencement of disciplinary proceedings against him cannot have been improper.

In attempting to apply the *Bender* decision to this case, appellant must therefore read that decision as holding that an acquittal in a criminal action bars a subsequent disciplinary proceeding as an affront to the integrity of the criminal judgment. This interpretation not only goes far beyond the limited holding of *Bender*, but conflicts with the well-established body of law discussed in Point I above. While those cases dealt specifically with the collateral estoppel question, their import was quite clearly to sanction the commencement by the Government of civil actions in general, and disciplinary proceedings in particular, despite an acquittal in a previous criminal action. Thus, there is nothing in the law or in the facts of this case to suggest that appellee's decision to follow that course was improper in any way or any reason.

Finally, it should be noted that the criminal action against appellant concerned only the bribery of Ostrow and not appellant's willful misrepresentation of the amount of the bribe to his clients for the purpose of personal gain. The latter misconduct was an independent ground for the disciplinary proceeding against him, and as shown in Point III below, there was sufficient evidence to support his disbarment for this misconduct alone. Thus, even if *Bender* were held to preclude disbarment with respect to Paragraphs II and III of the administrative complaint, it can have no effect on appellee's determination as to Paragraph IV.

POINT III

The District Court Correctly Held That Appellant's Fraudulent Misrepresentation To His Clients Of The Amount Of The Bribe For The Purpose Of Personal Gain Violates The Provisions Of 31 C.F.R. § 10.22(c) And That As Applied To The Facts Of This Case, 31 C.F.R. § 10.22(c) Is Not Unconstitutionally Vague.

Paragraph IV of the administrative complaint charges appellant with violation of 31 C.F.R. § 10.22(c) which provides:

> "§ 10.22 *Diligence as to accuracy*
>
> Each attorney, certified public accountant, or enrolled agent shall exercise due diligence:
>
> * * * * *
>
> (c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service."

The basis for this charge was the undisputed fact that after Ostrow had agreed to accept a bribe in the amount of $1,250, appellant advised the Suttons that the amount was $2,000, of which he paid $1,250 to Ostrow and kept $750 for himself (173a-74a).

Appellant contends that his alleged misconduct does not come within the terms of the 31 C.F.R. § 10.22(c). The Administrative Law Judge rejected this argument with the following analysis:

> Respondent contends that 10.22(c) of the regulations is vague and has not been violated. An obvious purpose of this subsection is to require and

> insure that a representative is prudent and truthful in his dealings with his client. Giving incorrect information to his clients ($2,000.00 and pocketing $750.00) was deliberate. In determining compliance by a representative thereunder, the regulation is not perforce limited to negligent, incorrect legitimate information, but, a fortiori, includes deliberate, illegitimate misinformation. A dishonest representative can hurt everyone. Truthfulness is an implicit qualification for every representative practicing before IRS. (260a-61a).

This conclusion was affirmed by the General Counsel in his decision on appeal:

> The purpose of this section is to insure that a representative perceives his duty to act prudently and honestly in all matters having to do with his authority to practice before the Internal Revenue Service. The evidence shows that not only did respondent attempt to subvert the integrity of an Internal Revenue Service employee, in addition, he consciously deceived his client for personal gain. In so doing, respondent was clearly guilty of dishonest and disreputable conduct. (269a).

In determining the meaning of an administrative regulation, the Supreme Court has said on more than one occasion that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Immigration and Naturalization Service* v. *Stanisic*, 395 U.S. 61, 72 (1969); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945). As the Court below held, appellant fails to advance any argument sufficient to meet this burden (297a).

The regulation in question provides that an accountant is obligated to exercise due diligence in determining the correctness of his representations to clients with reference to *any* matter administered by IRS. There is nothing in its language which limits that obligation to lawful matters only, and to infer such a limitation conflicts with the ordinary rule of statutory construction that a provision should be applied "according to the natural or customary purport of its language." 2A Sutherland on Statutory Construction § 46.01 (4th ed. 1973).* Nor does the purpose of the regulation require such a narrow reading of its terms. On the contrary, as noted above, the purpose of 31 C.F.R. § 10.22(c) is to insure that a representative deals prudently and honestly in his representations to his clients. Indeed, 31 U.S.C. § 1026, which authorizes the promulgation of such regulations, specifically provides for disbarment not only of representatives who fail to comply with the regulations, but also of those "who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten" the persons they represent. An intentional misrepresentation for the purpose of personal gain in connection with an unlawful bribe demonstrates the same lack of fitness to practice before the Internal Revenue Service as would similar misconduct in connection with lawful activity.

It is simply absurd for appellant to suggest that this interpretation requires a practitioner to became a participant in an illegal scheme and encourages the effectuation of criminal conduct (Brief, p. 44). Appellant decided to take part in bribery quite on his own and without any encouragement from the regulation. Having made this decision, however, appellant was not thereby released

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* Administrative regulations are subject to the same rules of construction as apply to statutes. See, *e.g.*, *Miller* v. *United States*, 294 U.S. 435, 439 (1935).

from his obligation to deal honestly with his clients pursuant to the provisions of 31 C.F.R. § 10.22(c). As a matter of policy, as well as construction, this Court should not allow appellant's commission of bribery to serve as a license for fraud.

Equally without merit is appellant's contention that 31 C.F.R. § 10.22(c) is unconstitutionally vague as applied. In *Jordan* v. *DeGeorge*, 341 U.S. 223, 231 (1951), the Court made the following observation with respect to the void-for-vagueness doctrine:

> We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach*, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. *United States* v. *Petrillo*, 332 U.S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connelly* v. *General Construction Co.*, 269 U.S. 385 (1926).

Moreover, as this Court recently stated in *diLeo* v. *Greenfield*, 541 F.2d 949, 953 (2d Cir. 1976):

> The test of a statute's vagueness for due process purposes is to be made with respect to the actual conduct of the actor who attacks the statute and not with respect to hypothetical situations at the periphery of the statute's scope or with respect to the conduct of other parties who might not be forewarned.

The regulation at issue here clearly states the obligation of a representative to deal honestly with his clients in making representations to them in connection with all matters administered by IRS. The absence of any lan-

guage specifically making this obligation applicable to bribe offers is hardly fatal. As the General Counsel stated in his decision on appeal:

> It should be obvious to anyone that a representative may not willfully deceive his client as to a material matter. (270a).

This is especially so where, as here, the misrepresentation by appellant was made for the purpose of defrauding the Suttons for his own personal gain, in clear violation of the statute under which 31 C.F.R. § 10.22(c) was promulgated. Nor is there any serious ambiguity as to the meaning of a "matter administered by the Internal Revenue Service" as applied to this case. Ostrow was conducting an audit of the tax returns of appellant's client. Thus, any representations made by appellant to the Suttons in connection with that audit, was "with reference" to such a matter and therefore clearly within the ambit of the regulation's proscription.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court dismissing the complaint.

Dated: New York, New York
January 10, 1977

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

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State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

10th day of January, 1977 she served a copy of the within Supplemental Appendix and two cys of the Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Michael S. Fawer, Esquire
1220 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

Stuart G. Schwartz, Esquire
445 Park Avenue
New York, New York 10022

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

10th day of January, 1977

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4693238
Qualified in New York County
Commission Expires March 30, 1978